Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5664

ROBERT MURRAY,

Petitioner,

—against—

CHESTER D. OWENS, Superintendent of Elmira Reception Center, Elmira, New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York; and WAYNE MUCCI, Director of Institutions and Facilities, Special Services for Children, for the City of New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT MUCCI IN OPPOSITION

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November 30, 1972

PETITION NOT PRINTED
RESPONSE NOT PRINTED
(by Owens + Lefkowitz)

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In the

Supreme Court of the United States

October Term, 1972

No. 72-5664

Robert Murray,

Petitioner,

—against—

Chester D. Owens, Superintendent of Elmira Reception Center, Elmira, New York, Louis J. Lefkowitz, Attorney General of the State of New York; and Wayne Mucci, Director of Institutions and Facilities, Special Services for Children, for the City of New York,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinion Below

The opinion of the Court of Appeals is now reported at 465 F.2d 289.

Questions Presented

1. Does either the guaranty of due process or that of equal protection require trial by jury in a juvenile delinquency proceeding as a condition of a disposition committing the juvenile to a correctional facility at which older

persons may be confined only as a result of criminal court proceedings in which they have a right to trial by jury?

2. Where acts of aggravated violence are involved, is it a denial of equal protection to afford greater discretion with respect to the commitment of 15-year-olds than with respect to that of younger delinquents?

Statement of the Case

(a)

The petition to the District Court shows that the Family Court of New York, on April 1, 1971, adjudicated petitioner a delinquent and committed him to the Elmira Reception Center for a term not to exceed three years.* He was then fifteen years old, and he had been found to have committed acts which if committed by an adult would constitute robbery in the first degree, rape in the first degree, burglary, possession of a dangerous weapon, and menacing. The findings were made by the Court, petitioner's motion for a jury trial having been denied.

Under New York Family Court Act § 758(b) a person who is fifteen years old at the time of his commission of an act which, if committed by an adult, would constitute a Class A or Class B felony may be committed to Elmira Reception Center for a term not to exceed three years. Robbery in the first degree is a Class B felony (New York Penal Law, § 160.15).

On appeal to the Appellate Division of the New York Supreme Court, that Court modified to the extent of dis-

* The allegations of the petition to the District Court in this regard should be read together with the copy of the order of commitment attached to the answer of respondent Mucci.

missing the rape charge for lack of corroborative evidence; and it otherwise affirmed. Petitioner appealed to the New York Court of Appeals, which dismissed the appeal on the ground that it did not lie as of right; and that Court later denied his motion for leave to appeal.

Petitioner did not seek review by this Court. He sought declaratory and injunctive relief in the United States District Court. That Court denied relief on the ground that it was barred by the judgment in the delinquency proceeding, its opinion suggesting that habeas corpus might be appropriate.

(b)

There followed the instant proceeding. Its gravamen is set forth in the petition to the District Court as follows:

> "7. Petitioner contends that Family Court Act § 758(b) as applied denied him equal protection of the law by authorizing his three year commitment without a jury trial to Elmira reception center, a state correctional facility, inasmuch as all other youths similarly confined by the state's criminal courts are entitled to trial by jury. Alternatively, petitioner contends that F.C.A. § 758(b) violates due process on its face in that it permits the Family Court to try him civilly, as a child, but to punish him by imprisonment in an adult correctional facility."

It is not alleged that the Family Court disposition is inappropriate to petitioner's capacities, character, past history, and other circumstances; and the facts of such matters are not in this record. Nor is there complaint of the rehabilitative treatment petitioner may expect to

receive. The complaint is solely that he will be confined in the same correctional facility to which an older person may be confined only after a jury trial.

(c)

The Reception Center at Elmira is a "medium security" facility for males aged 16 to 20 inclusive at the time of imposition of sentence. 7 NYCRR 100.75, 150.1. A reception center is used for "reception, classification and program planning for purposes of confinement, treatment and transfer." New York Correction Law § 2.

The Commissioner of Correction has power to transfer inmates from one correctional facility to another (id., § 23).

Correctional facilities for males, other than centers for reception or temporary detention, are: places of maximum or medium security, differing according to the age ranges of the persons confined therein, ranging from 16 upwards; and places of minimum security, for those between 16 and 24, inclusive. 7 NYCRR 100.1 et seq. Chronological age is not necessarily controlling, since placement may be made according to maturity level or may be determined according to whether the facility offers a special program that can be of substantial benefit to the health, care or rehabilitation of the inmate. Persons 15 years old who are received pursuant to Family Court commitment may be received or confined in places designated for those aged 16. 7 NYCRR 150.1.

POINT I

Since the denial of a jury trial in juvenile cases is justified substantially, if not wholly, upon characteristics of the juvenile court system other than the distinctive quality of its dispositions, it is not a denial of due process or of equal protection that a juvenile is committed to a correctional facility in which older persons are confined only after a criminal court proceeding in which a jury trial is available.

(a)

This Court has held that the question of whether a jury trial is required in a criminal proceeding depends upon the severity of the possible punishment, and it has drawn the dividing line at confinement in excess of six months. By this test, if juvenile delinquency proceedings were required to be treated in the same manner as criminal proceedings, jury trials would be required. However, *McKeiver* v. *Pennsylvania*, 403 U.S. 528 (1971), has held to the contrary.

In the following cases the severity of the authorized disposition was deemed of major relevance to the determination of the Court: *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), at 159-161, *Bloom* v. *Illinois*, 391 U.S. 194 (1968), and *Baldwin* v. *New York*, 399 U.S. 66 (1970), holding that jury trials were mandated by the federal Constitution in the state proceedings involved; *In Re Gault*, 387 U.S. 1 (1968), at pp. 13, 27, 29, 34, 36-37, 41, 44, 49-50, 57, 61, 72, holding that even in juvenile court proceedings the Constitution mandates adequate written notice and protections with regard to aid of counsel, confrontation, cross examination, and self-incrimination; *In Re Winship*, 397 U.S. 358

(1970), at pp. 363-364, 365-366, 367, 368, 372, 373-374, holding that proof beyond a reasonable doubt is required in a juvenile court proceeding on a charge of commission of an act which would be a crime if committed by an adult.

It was observed in *Gault* that due process standards, adequately administered, would not compel the States to displace any of the benefits of the juvenile process (387 U.S. at p. 21). A similar remark was made in *Winship* (397 U.S. at pp. 366-367); and it was noted in that portion of the opinion in *McKeiver* which discussed the effect of the Court's earlier holdings in juvenile court cases (403 U.S. at p. 534).

Against this background, it is significant that *McKeiver*, which held that the Due Process Clause did not assure the right to trial by jury in the adjudicative phase of state juvenile court proceedings, did not rely upon limitations, distinctive to the juvenile court process, upon the restraints which may be imposed upon the liberty of juveniles. It had been argued by counsel, as this Court noted (403 U.S. at p. 542), that an adjudicated delinquent faced the possibility of confinement until his majority in an institution described by an appellate court of the State involved as a "maximum security prison for adjudged delinquents and youthful criminal offenders". It had also been argued by counsel, as the Court also noted (*ibid.*), that the juvenile court system's primary benefits—which were said to be discretionary intake procedure permitting disposition short of adjudication, and flexible sentencing permitting emphasis on rehabilitation—were not dependent upon non-jury adjudications; and that adjudication of factual issues and disposition were very different matters with very different purposes, the purpose of the former being indistinguishable from that of the criminal trial.

Among the grounds, here relevant, of the holding in *McKeiver* were: the possibility that the requirement of a jury trial as a matter of constitutional precept would transform the proceeding into a fully adversary process and effectively end the idealistic prospect of an intimate, informal, protective proceeding (p. 545); the consideration that the requirement would not greatly strengthen the fact-finding function but would detract from the juvenile court's assumed ability to function uniquely and that the alternative would be regressive and would tend to place the juvenile squarely in the routine of the criminal process (p. 547); the high promise of the system and the need for experimentation and exploration of different ways of dealing with the young (p. 547); the traditional delay, the formality, and the clamor of the adversary system which would accompany the injection of the jury trial into the juvenile court system (p. 550).

Finally, the Court, stating that the essential issue was whether the adjudicative phase of the juvenile proceeding was to be equated with the criminal trial, refused to do so (p. 550).

The concurring opinion of Mr. Justice WHITE relied upon the differences between the juvenile and criminal court systems in regard to assumptions, motives, and susceptibility to abuse. Noting the dissatisfaction with dispositions after adjudication and with the record of rehabilitative custody, the Justice stated that such shortcomings "are in no way mitigated by providing a jury at the adjudicative stage" (p. 553).

It is clear from the face of the opinions in *McKeiver* that the denial of a jury trial was sustained on grounds

related to the nature of the adjudicative process in the juvenile court wholly or substantially independent of considerations of custody after adjudication. That appearance is confirmed by this Court's failure to attribute significance to what had been advanced in the arguments of counsel in that case (supra, p. 6) and noted in somewhat different form in the observation in the dissenting opinion (403 U. S. at 560) that in 1965 over 100,000 juveniles were confined in adult institutions.

Moreover, this Court was familiar with such facts. In *Kent* v. *United States,* 383 U.S. 541 (1966), the Court observed that the juvenile court statute there involved permitted "rare exceptions" in which the delinquent could be "jailed along with adults" (383 U.S. at p. 556). In *Gault,* the Court, pointing to the gravity of the exposure involved as a reason for affording the protections the case was to hold essential, stated that in over half the States juveniles could be placed in or transferred to adult penal institutions after having been found delinquent by a juvenile court (387 U.S. at p. 50). At an earlier stage of the opinion it had noted a somewhat similar fact (387 U.S. at p. 20, note 26) and it had also noted the existence of a "substantial question as to whether fact and pretension, with respect to the separate [from adults] handling and treatment of children, coincide" (387 U.S. at p. 22, note 20).

Those remarks become more significant in the light of the observations of the late Mr. Justice HARLAN in *McKeiver.* He concurred in the result on the ground that criminal jury trials were not required of the States under the Federal Constitution. He noted, however, that he could not see why, given the shortcomings of the juvenile court sys-

tem which the plurality opinion seemed to acknowledge,* and "given *Duncan,* juveniles as well as adults would not be constitutionally entitled to jury trials, so long as juvenile delinquency systems are not restructured to fit their original purpose" (403 U.S. at p. 557).

As has been observed, the *McKeiver* rationale was grounded, at least in substantial part, upon considerations related to the peculiar characteristics of the adjudicative process in the juvenile, as distinguished from the criminal, court system. It did not rest upon the nature or length of confinement distinctive to the juvenile court system. Accordingly, in the light of *McKeiver,* it is not a due process objection that the result may be a confinement in the same correctional facility as a confinement resulting from the ordinary criminal process in which there is a right to jury trial. The justification for the distinction with regard to jury trial lies not in the nature of the confinement, or at least not entirely in the nature of the confinement, but in the process which leads to it. This conclusion regarding the significance of *McKeiver* is confirmed by the manifestations of this Court's awareness that in half the States juveniles might find themselves confined with older criminals.

(b)

Since at least substantial justification for the denial of a jury trial as against due process objections lies in the distinctive nature of the juvenile court process other than disposition, the same justification would seem to serve

* That opinion had cited an authoritative observation to the effect that the distinction between the rehabilitative and the punitive often disappears because of the inadequacy of facilities, personnel and dispositional alternatives (403 U.S. at p. 544).

against equal protection arguments. However, without pretending that what we are about to say differs in substance from what was expressed or implicit in *McKeiver*, we note the distinctions applicable to the facts of this case when regarded from an equal protection viewpoint.

The entire proceeding which resulted in petitioner's commitment was of a type the predominant* purpose of which is rehabilitation. Even if the underlying facts are found adversely to a juvenile, there is no adjudication unless it is established that the "respondent requires supervision, treatment, or confinement". New York Family Court Act §§ 731, 751. See *Matter of Addison*, 20 AD 2d 90, 93 (4th Dept., 1963). A hearing on disposition is mandatory. Family Court Act, § 746; *Matter of Raoul P.*, 27 AD 2d 522 (1st Dept., 1966); *Matter of Robert F.*, 30 AD 2d 933 (4th Dept., 1968).

All persons over 7 and under 16 at the time of the conduct involved are within the exclusive jurisdiction of the juvenile court (Family Court Act §§ 712, 714), regardless of whether an adult guilty of such conduct would be subject to a penalty as severe as death or life imprisonment (id., § 713). The most stringent available disposition is applicable only to those aged 15 who commit acts which if committed by an adult would be Class A or Class B

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* The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime, upon which the Court in *McKeiver* relied in part, recognized that while rehabilitation through individualized handling was appropriately the primary way of dealing with children in the protection of the community against threatening conduct, the method of incapacitation should not be excluded. It continued, as quoted by the Court (403 U.S., at 546, note 6): "What should distinguish the juvenile from the criminal courts is greater emphasis on rehabilitation, not exclusive preoccupation with it."

felonies. In such cases the commitment may be to Elmira Reception Center, but no commitment may exceed three years (id., § 758). A Class A felony carries an indeterminate sentence with a maximum of life imprisonment and a minimum of 15 years. A Class B felony may carry indeterminate imprisonment for a maximum of 25 years (New York Penal Law § 70.00).

Petitioner's underlying acts would have constituted: robbery in the first degree, a Class B felony (Penal Law § 160.15); at least the lowest degree of burglary, a lesser felony (Penal Law § 140.20); possession of a dangerous weapon, at least juvenile delinquency as matter of law (Penal Law § 265.05); and menacing, a misdemeanor (Penal Law § 120.15).

All criminal accusations against persons who are older than 16 and who are entitled to a jury trial must be processed, subject to minor exceptions (New York Criminal Procedure Law § 720.15), according to the usual course of criminal procedure and punishment. In no event are persons who are entitled to jury trials exempt as matter of right from ordinary penalties.

Such exemptions may be granted only in the exercise of judicial discretion. An accused person does not know until *after* he has been found guilty whether he will be treated as a "youthful offender" (Criminal Procedure Law § 720.20), in which case he is saved from an indeterminate sentence (id., § 720.25), or as a "young adult", in which case he may be sentenced, in lieu of any other sentence of imprisonment, to a reformatory term of unspecified duration (Penal Law § 75.00), with a maximum of four years (Penal Law § 75.10). In any event, regardless of sentence, there *must* be a youthful offender adjudi-

cation (Criminal Procedure Law § 720.20) or a judgment of conviction (Penal Law § 60.10). Dispositional hearings are compelled in the ordinary criminal case only where prior convictions will affect the sentence (Criminal Procedure Law, §§ 400.20, 400.40), or for the purpose of determining the amount of fine, where gain from a crime is involved (id., § 400.30). Cf. id., § 400.10.

Thus, while it may be that the older person and the juvenile delinquent may find themselves in the same correctional facility, one as the result of a jury trial and the other following a non-jury trial, that difference is justified by the difference in the process which led to the confinement. The latter arrived by a process which was protective and rehabilitative and which, as *McKeiver* held, warranted the denial of a jury trial in the first instance. The former was subjected to regular criminal process.

In *Kent* v. *United States*, 383 U.S. 541 (1966), the Court considered important, in its determination that a juvenile delinquency proceeding could not be waived to a criminal court without certain protections characteristic of due process, that there was a tremendous difference of exposure between the limited period of confinement at the extreme of the power of the juvenile court to order and the death sentence which the criminal court could impose (557). Here, we start with the position that ordinarily a jury trial is not, as a matter of due process, a requirement in the juvenile court, because of the distinctive nature of such a court; and the distinction is strengthened by the consideration that the older person, who may have been sentenced for the same underlying act following a trial under the criminal court-jury system, faced a maximum confinement not of three years but of 25 years.

(e)

There is little warrant for the District Court's optimism regarding the "extremely limited disruptive effect" of its holding (341 F. Supp., at p. 728). Though only "a very few" may actually be committed to Elmira Reception Center each year, it is obvious that there is a far greater number of cases in which such a commitment is possible. Under the ruling of the District Court there could be no such commitment unless a jury trial were had in place of a fact-finding hearing. Unless it were decided in advance that there would be no such commitment, every such case would require a jury trial.

The District Court apparently understood this. But it remarked that it is a "small imposition to make the authorities decide" in advance whether to seek such a commitment or to "settle" for something else (ibid.). This assumes that the "authorities", whoever they may be, are like prosecuting attorneys, despite the Court's recognition that a juvenile court disposition should not be penal in its nature. Such dispositions are normally matters for probation workers to recommend to the informed discretion of the Court, not for lawyers to press as prosecutors. Which "authorities" are to control the case if lawyers and probation workers disagree?

The judge cannot make that decision. It is clear that, as the Family Court Act recognizes (§746), the court should not be informed of matters governing disposition until the fact-finding hearing has been completed.

Moreover, to compel the "authorities", prior to the dispositional hearing, to decide upon the disposition to be sought would tend to subvert the very purpose of separate

and subsequent dispositional hearings. It would tend to motivate hasty investigations of matters relevant to disposition. It would deprive the authorities of the benefit of material adduced for the first time at the dispositional hearing. And it would create pressures to make the disposition justify the trouble and expense resulting from an earlier decision not to "settle".

It may be added that the availability of a jury trial unless the authorities "settle" for a possible disposition other than a commitment to Elmira Reception Center may itself have a prejudicial effect upon the fact-finding process. The mechanics of demand for a jury or of waiver, or of refusal to "settle", might well inform the Court that such a commitment, which may depend upon prior behavior as well as upon the act in issue, is feared by the respondent or deemed appropriate by the "authorities". As we have noted, it is the scheme of the Family Court Act (§746) that probation service reports are not furnished to the Court prior to the completion of a fact-finding hearing. Where trial by jury is had, that body will know that such a commitment was deemed, at least by the "authorities", to be a reasonable prospect.

Also, as the Court of Appeals here noted, the juvenile court proceeding contemplates disposition of the issues "promptly and without all the time-consuming procedures which accompany trial by jury. Furthermore, where rehabilitation is doubtful, jury trials will not speed its attainment" (465 F. 2d, at p. 292).

POINT II

In the context of their prior commission of violent acts, the greater physical and mental maturity of older juveniles furnishes a valid basis for the wider discretion with respect to their commitment.

(a)

The statute confers upon the Family Court discretion to make commitments of fifteen year old juvenile delinquents which are not different from that of commitments of younger delinquents [Family Court Act §758(a)]. It could have committed petitioner to a state training school. Accordingly, the real complaint in regard to the statutory distinction between fifteen year old delinquents and younger ones is that the Family Court has no discretion to commit the latter to Elmira but does have such discretion with regard to those aged fifteen.

(b)

The acts which constitute Class A and Class B felonies are crimes, or attempts to commit crimes, which largely involve aggravated use of force or violence. Other things being equal, the older the juvenile is, the greater is his mental and physical development and the greater is his capacity to commit such crimes. Where the juvenile has already done such acts, it is clearly imperative to consider the possibility that he may do them again when he is brought into association with younger juveniles who, physically weaker and of less mature mental development, are the more vulnerable. Their safety requires no less.

Moreover, the security measures necessary to maintain the confinement of such older juveniles may well be greater

than is necessary in the situation of younger ones. This is an additional reason for differentiating confinement conditions based upon differences in age.

That is not to say that the separation of the older from younger juveniles is necessarily required. But the foregoing considerations point up the necessity for giving a judge the latitude to do so, all that is involved here.

Even the District Court opinion, upon which petitioner would rely in other respects, recognizes that it is "indeed, rational for the New York Legislature to make provision for keeping the very bad, older youngsters from corrupting the younger children." 341 F.Supp., at p. 725.

The claim that a wider discretion is conferred with respect to the commitment of delinquents aged 15 is unaccompanied by any showing of what in practical terms are the disadvantages to such 15-year-olds. It bears repetition that a commitment to Elmira is discretionary and there is no claim that such a commitment is intrinsically inappropriate to the circumstances of the petitioner.

It was observed in *Williams* v. *Illinois,* 399 U.S. 235 (1970), that (p. 243):

> "Sentencing judges are vested with wide discretion in the exceedingly difficult task of determining the appropriate punishment in the countless variety of situations that appear. The Constitution permits qualitative differences in meting out punishment and there is no requirement that two persons convicted of the same offense receive identical sentences. Thus it was that in *Williams* v. *New York,* 337 U.S. 241, 247 (1949), we said: 'The belief no longer prevails that every offense in a like legal category calls for an

identical punishment without regard to the past life and habits of a particular offender.'"

That observation is not less applicable here because we are dealing with dispositions aimed primarily at rehabilitation rather than at punishment. The "past life and habits of a particular offender" are at least as material to rehabilitation as they are to punishment.

CONCLUSION

The petition for a writ of certiorari should be denied.

November 30, 1972

Respectfully submitted,

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